No. 90-1371

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM STEPHENSON,

Petitioner,

v.

McLEAN CONTRACTING COMPANY, INCORPORATED

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a worker aboard a special-purpose vessel in navigation (e.g., dredges, barges, and other such vessels) whose duties and employment relate to the function of said vessel and not primarily to the transportation function of the vessel presents a jury question as to seaman status under the Jones Act.

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OPINIONS BELOW

The decision of the Court of Appeals for the Fourth Circuit is an unpublished opinion and is included in the Appendix starting at A-1. The decision of the United States District Court for the District of Maryland is unreported and is included in the Appendix starting at A-8.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit sought to be reviewed was entered on December 4, 1990. Jurisdiction to review this judgment by writ of certiorari is conferred on the Supreme Court pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statute involved is 46 U.S.C. § 688(a), commonly known as the Jones Act:

> (a) Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of a trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principle office is located.

STATEMENT OF THE CASE

William Stephenson was employed by McLean Contracting Company and was injured on December 23, 1985 in the course of his employment while working as a piping welder on a crane barge. The crane barge was being used as a work platform for the construction of a bridge.

Suit was filed in federal court under the Jones Act and the maritime doctrine of unseaworthiness against his employer. Summary judgment was subsequently entered in favor of the employer, and the case was appealed to the Court of Appeals for the Fourth Circuit. The appellate court affirmed the lower court's determination that Stephenson was not primarily engaged in moving the barge or otherwise contributing to a transportation function of the barge, and therefore held that Stephenson was not entitled to relief under the Jones Act or the doctrine of unseaworthiness.

REASON FOR GRANTING WRIT

The issue of Jones Act coverage for workers on special purpose vessels (such as dredges, barges, and other similar vessels) goes beyond the litigants of this case and directly affects thousands of workers in all geographic areas of the United States.

The Supreme Court recently granted certiorari in the case of Wilander v. McDermott International, Inc., 887 F.2d 88 (5th Cir. 1989), cert. granted, No. 89-1474. Oral argument was conducted on December 1, 1991 in this case, but a written opinion has not yet been rendered. In Wilander, as in the present case, the issue was the appropriate test to be applied in determining seaman status under the Jones Act. Moreover, there has been no disposition by this Court on the Writ of Certiorari in the case of Yoash v. McLean Contracting Co., No. 90-602, another admiralty case involving the issue of seaman status under the Jones Act.

By its terms, the Jones Act authorizes any "seaman" who is injured in the course of employment to maintain an action at law for damages against his employer. The Jones Act, however, does not define the term "seaman," and it has been left to the federal courts to develop the scope of this term. Through judicial interpretation, the term "seaman" has become equivalent in meaning to the phrase "member of the crew of a vessel." Swanson v. Marra Brothers, Inc., 328 U.S. 1 (1946).

The federal courts have taken two divergent approached in determining coverage under the Jones Act for workers connected with the operation of special purpose vessels.[1] Specifically, the lower courts differ as to what, if any, emphasis is to be placed on a worker's activities to the transportation function of the vessel.

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[1]. For an extensive discussion of cases applying the different approaches see Annotation, Applicability of Jones Act to Workers Connected with Operation of Dredges, Drilling Platforms, Derricks, or Similar Special-Purpose Equipment, 92 ALR Fed. 733.

The Seventh and Third Circuits require a worker to have performed significant duties relating to the transportation function of the vessel. Johnson v. John F. Beasley Construction Company, 742 F.2d 1054 (7th Cir. 1984), cert. denied, 469 U.S. 1211 (1985); Simko v. C & C Marine Maintenance Co., 594 F.2d 960 (3rd Cir.), cert. denied, 444 U.S. 833 (1979); Griffith v. Wheeling Pittsburg Steel Corp., 521 F.2d 31 (3rd Cir. 1975), cert. denied, 423 U.S. 1054 (1976).

The First, Second, Fourth (until 1988 discussed infra), Fifth, Sixth, and Eight Circuits, on the other hand, interpret the aid to navigation requirement as satisfied if an employee's duties relate to the special purpose function of the vessel, and not just exclusively the transportation function. See e.g., Bennett v. Perini Corp., 510 F.2d 114 (1st Cir. 1975), Stafford v. Perini Corp., 475 F.2d 507 (1st Cir. 1973); Harney v. Moore Building Corp., 359 F.2d 649 (2d Cir. 1966); Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067 (5th Cir. 1986),

Offshore Co. v. Robison, 266 F.2d 769 (5th Cir. 1959); Wilkes v. Mississippi River Sand & Gravel Co., 202 F.2d 383 (6th Cir. 1953); Slatton v. Martin K. Eby Constr. Co., 506 F.2d 505 (8th Cir. 1974), cert. denied, 421 U.S. 931 (1975). The appellate court in Stafford, for example, stated that since one of the primary functions of the barge was to provide a work area for the construction of concrete forms, it was clear that the worker's duties directly related to the performance of the barge's mission.

The Court of Appeals for the Fourth Circuit in Whittington v. Sewer Construction Co., 541 F.2d 427, 436 (4th Cir. 1976), established a three-prong test for determining seaman status under the Jones Act: (1) the worker must be more or less permanently attached to a vessel or fleet; (2) his duties serve naturally and primarily as an aid to navigation in the broadest sense; and (3) the vessel is in navigation. In Whittington, the court included the language "in the broadest sense" in

the second prong of the test. In Lawrence v. Norfolk Dredging Company, 319 F.2d 805 (4th Cir. 1963), the Fourth Circuit stated that "navigation in the broadest sense" is not confined strictly to the actual navigating or movement of the vessel but embraces duties essential for other purposes of the vessel. Id. at 366. Thus, the approach in the Fourth Circuit has been that the worker need not be involved in the transportation function of the vessel. The Fourth Circuit, however, eventually departed from this language in Stephenson v. McLean Contracting Company, 863 F.2d 340 (4th Cir. 1988), cert. denied, 109 S. Ct. 2110 (1989) and in the instant case by holding that the consideration in the Fourth Circuit is whether the duties primarily contribute, either directly or indirectly, to the transportation function of the vessel. Summary judgments in both Stephenson and in this case were entered by Judge Motz of the U.S. District Court for Maryland.

Although the Supreme Court has never enunciated a precise test in determining the status issue for coverage under the Jones Act, this Court has indicated that a worker's status must be defined in reference to the vessel upon which he is working and that navigation embraces duties other than the vessel's transportation function. In Norton v. Warner Co., 321 U.S. 565 (1944), this Court stated that members of the crew are not confined to those who can "hand, reef and steer." Id. at 572. In Gianfala v. Texas Company, 350 U.S. 879 (1955), the employee was a member of a drilling crew and was killed while unloading drilling pipe onto the barge. At trial the issue of the employee's status was submitted to the jury, which found in favor the employee. The Fifth Circuit Court of Appeals reversed, holding that as a matter of law the employee was not aboard primarily to aid navigation. The Supreme Court, without discussion, reversed and remanded the case to the trial court with instruction to reinstate the jury

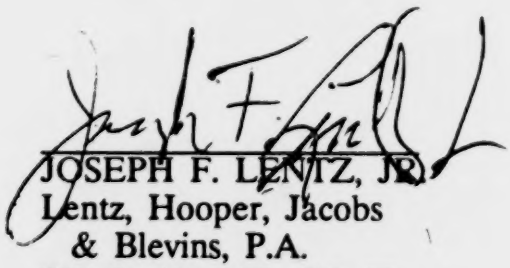
verdict in favor the employee. Similarly, in Grimes v. Raymond Concrete Pile Co., 356 U.S. 252 (1958) this Court determined that a worker assisting in the erection of a radar station may be a seaman for purposes of the Jones Act. Lastly, this Court in Butler v. Whiteman, 356 U.S. 271 (1958) held that an employee doing odd jobs around his employer's wharf may be a seaman for purposes of the Jones Act.

The standard developed by the Fourth Circuit is not consistent with the Supreme Court decisions previously discussed. These Supreme Court cases indicate that coverage is extended to those who work to further the purpose or function of the vessel. The circuit courts that emphasize the transportation function of the vessel have focused on the Supreme Court's statement that seaman are those aboard "primarily to aid in navigation." See South Chicago Coal & Dock Co. v. Bassett, 309 U.S. 251 (1940). This approach, however, disregards the later holdings of this Court.

In keeping with the remedial purpose of the Jones Act, the Act has been and should be construed broadly. The test announced by the Fourth Circuit and those circuits adopting a similar approach requiring a worker to be involved with the "transportation function" is not consistent with opinions from this Court and other federal circuits. Certiorari should therefore be granted to provide useful guidance to the lower courts and to promote uniform application of the Jones Act throughout the United States.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that a Writ of Certiorari be granted.



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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-2301

WILLIAM E. STEPHENSON,

Plaintiff-Appellant,

v.

MCLEAN CONTRACTING COMPANY, INC.,

Defendant-Appellee

Appeal from the United States District Court for the District of Maryland, at Baltimore. J. Frederick Motz, District Judge. (CA-88-2690-JFM)

Argued: October 29, 1990 Decided: December 4, 1990

Before RUSSELL and NIEMEYER, Circuit Judges, and CACHERIS, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion.

ARGUED: Joseph Francis Lentz, Jr., LENTZ, HOOPER, JACOBS & BLEVINS, P.A., Baltimore, Maryland, for Appellant. Thomas G. Young, III, YOUNG & BATTISTA, P.A., Baltimore, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

PER CURIAM:

This suit seeks recovery under the Jones Act for injuries sustained by William Stephenson while working as a pipe welder on and off a crane barge which was being used as a work platform in the construction of a bridge across the Choptank River in Maryland. Stephenson originally brought both Jones Act and unseaworthiness claims, and the district court sustained the defendant's motion for summary judgment in connection with both counts. The Court found that the plaintiff did not qualify as a "seaman" under the Jones

Act, nor was he "doing the work of a seaman" at the time of his injury and thus was without any claim for unseaworthiness. The employee appealed the dismissal of his Jones Act claim, but not the denial of the unseaworthiness count. We affirm the district court's grant of summary judgment dismissing plaintiff's Jones Act claim.

I.

This is the second appeal by the plaintiff, William Stephenson, in cases where he has sought recovery under the Jones Act, 46 U.S.C. App. § 688 (a), and under the maritime doctrine of unseaworthiness, for injuries sustained by him as an employee of the defendant McLean Contracting Company while engaged in the construction of a bridge across the Choptank River in Maryland. The first action dealt with injuries alleged to have been sustained by the plaintiff on March 26, 1986. This case was decided adversely to the Plaintiff by the district court in a decision affirmed by us. Stephenson

v. McLean Contracting Co., 863 F.2d 340 (4th Cir.), cert. denied, 109 S. Ct. 2110 (1989). The present action concerned an alleged injury sustained by the plaintiff on December 23, 1985, while working on the same construction project as the first in a similar capacity.

The plaintiff, at the time both his alleged injuries, was working on and off the ANNAPOLIS, the crane barge used as a work platform in connection with the construction of columns which were to support the bridge's span over the river. The barge itself was not self-propelled but was moved from one work station to another along the length of its anchor lines. In his first case, we found that as an employee of the defendant, the plaintiff performed "a variety of duties, including welding, cutting off piling, constructing on the framework for the bridge, riding concrete buckets and assisting in the pouring of concrete [for the bridge]." 863 F.2d at 341. Under these facts, we held that as a matter of law Stephenson could not claim "seaman" status because his

duties did not serve naturally and primarily as an aid to navigation; likewise, his unseaworthiness claim was also properly dismissed because he was not "doing the work of a seaman." Based on this earlier holding, the defendant here moved for summary judgment. After finding that Stephenson "was in the same status and was performing the same type of work which he was performing when he suffered [the other] injury on March 26, 1986, "the district court granted the motion on both counts of plaintiff's complaint.

II.

On the plaintiff's Jones Act claim, the district court in Stephenson's first case "assume[d] that plaintiff was permanently attached to the ANNAPOLIS and that the ANNAPOLIS was in navigation." The Court found, however, that the plaintiff "was not primarily engaged in moving the ANNAPOLIS or otherwise contributing to a transportation function of the barge. Nor was he indirectly contributing to the vessel's navigation functions

by providing support to those who were performing them. Rather, the nature and purpose of his activities were to construct a bridge, a job not in aid of navigation." On those facts, the Court concluded the plaintiff had not established that he was a "seaman" entitled to invoke the benefits of the Jones Act.

On appeal, we affirmed the district court's granting of summary judgment to dismiss plaintiff's Jones Act claim, holding that on these facts

> [W]e think it is clear that the duties of Stephenson did not "serve naturally and primarily as an aid to navigation in the broadest sense." Whittington [v. Sewer Construction Co., 541 F.2d 427, 436 (4th Cir. 1976].
>
> We thus agree with the district court that the plaintiff failed to present evidence that he was a seaman within the test set forth in Whittington, and that there was no genuine issue of material fact to go to the jury. Such judgment is proper where it is quite clear what the truth is.

863 F.2d at 341.

The earlier Stephenson case has been reaffirmed by Yoash v. McLean Contracting Co., 907 F.2d 1481 (4th Cir. 1990), which involved claims by two employees

engaged on the same project as Stephenson in much the same capacity. We find Stephenson and Yoash controlling in this case and accordingly affirm the decision herein.

IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF MARYLAND

WILLIAM E. STEPHENSON *
*
v. * Civil No. JFM-88-2690
*
MCLEAN CONTRACTING COMPANY
****

MEMORANDUM

In this action plaintiff, William E. Stephenson, asserts Jones Act and unseaworthiness claims in connection with an accident which occurred on December 19, 1985. Defendant has moved for summary judgment on the ground that at the time of the accident plaintiff was not a seaman.

Defendant's motion will be granted. Plaintiff was in the same status and was performing the same type of work which he was performing when he suffered another injury on March 26, 1986. He asserted Jones Act and unseaworthiness claim in connection with that accident, and in Stephenson v. McLean Contracting Co., 863 F.2d 340 (4th. Cir. 1988), cert. denied, 109 S. Ct. 2110 (1989),

the Fourth Circuit, affirming this Court, held that plaintiff was not a seaman. That ruling controls here. The only fact to which plaintiff points to attempt to distinguish the prior case is that he was moving an iron pipe when the December 9, 1985 accident occurred. He contends that this pipe was "cargo," and that he was therefore contributing to the "transportation functions" of the crane barge ANNAPOLIS. However, the pipe in question was construction material to be used at the immediate job site, and the pipe was not being transported by the ANNAPOLIS but was to be welded to pilings.

A separate order granting defendant's motion is being entered herewith.

Date: November 22, 1989

J. Frederick Motz
U.S. District Court

IN THE UNITED STATES DISTRICT COURT
FOR DISTRICT OF MARYLAND

WILLIAM E. STEPHENSON *
*
v. * Civil No.: JFM-88-2690
*
MCLEAN CONTRACTING CO.

****

ORDER

For the reasons stated in the memorandum entered herein, it is this 22nd day of November, 1989

ORDERED

1. Defendant's motion for summary judgment is granted; and

2. Judgment is entered in favor of defendant against plaintiff.

J. Frederick Motz
United States District Judge